DOCKET FILE COPY ORIGINAL

RECEIVED

Before the
Federal Communications Commission
Washington, D.C. 20554

| | | |
|---|---|---|
| In the Matter of<br><br>Telecommunications Services<br>Inside Wiring<br><br>Customer Premises Equipment | ) | CS Docket No. 95-184 |
| In the Matter of<br><br>Implementation of the Cable<br>Television Consumer Protection<br>and Competition Act of 1992<br><br>Cable Home Wiring | ) | MM Docket No. 92-260 |

# OPPOSITION AND COMMENTS OF GTE SERVICE CORPORATION

GTE Service Corporation,
on behalf of its affiliated
domestic telephone and video
service companies


John F. Raposa, HQE03J27
GTE Service Corporation
P.O. Box 152092
Irving, TX 75015-2092
(972) 718-6969


January 15, 1998

Their Attorneys

## TABLE OF CONTENTS

# SUMMARY

The Commission's recently-adopted wiring disposition framework is a substantial step toward facilitating competition among multichannel video programming distributors ("MVPDs") in multiple dwelling unit ("MDU") buildings. This framework correctly promotes competition by allowing MDU building owners to facilitate the disposition of cable home wiring on behalf of residents. Such an approach addresses the uncertainty concerning the legal ownership of cable wiring and gives an MDU building owner both the incentive and ability to allow alternative MVPDs to compete for MDU building residents.

On reconsideration, the Commission should not take any action that would weaken the operation of these rules or otherwise limit their pro-competitive benefits. In particular, the Commission should reject the suggestion of Time Warner and others to prohibit operation of the wiring disposition rules in mandatory access states. Likewise, the Commission should decline to adopt Time Warner's proposal to remove the FCC's presumption that the wiring disposition rules apply unless an incumbent obtains a court ruling within 45-days of the MDU owner's notification to terminate service. Finally, there simply is no basis to adopt Time Warner's argument that open video system operators must be excluded from the Commission's wiring disposition rules.

Rather, GTE suggests that the Commission should modify its rules in two narrow respects. Specifically, the Commission should: 1) decrease the notification and election time frames in the unit-by-unit context; and 2) follow DirecTV's suggestion to

require an incumbent to first offer to sell its cable wiring before electing the removal option. These modifications should be adopted because they will provide a smooth transition between MVPDs and further promote fair competition among MVPDs for MDU residents.

Before the
Federal Communications Commission
Washington, D.C. 20554

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Telecommunications Services Inside Wiring | ) | CS Docket No. 95-184 |
| | ) | |
| Customer Premises Equipment | ) | |
| | ) | |
| In the Matter of | ) | |
| | ) | |
| Implementation of the Cable Television Consumer Protection and Competition Act of 1992 | ) | MM Docket No. 92-260 |
| | ) | |
| Cable Home Wiring | ) | |

**OPPOSITION AND COMMENTS OF GTE SERVICE CORPORATION**

GTE Service Corporation, on behalf of its affiliated domestic telephone and video service companies (collectively "GTE"),[1] hereby files its Opposition and Comments to the Petitions for Reconsideration of the *Order* issued in the above-captioned dockets.[2] In order to promote competition, GTE urges the Commission to refuse to adopt the

---

[1] GTE Alaska, Incorporated, GTE Arkansas Incorporated, GTE California Incorporated, GTE Florida Incorporated, GTE Hawaiian Telephone Company Incorporated, The Micronesian Telecommunications Corporation, GTE Midwest Incorporated, GTE North Incorporated, GTE Northwest Incorporated, GTE South Incorporated, GTE Southwest Incorporated, Contel of Minnesota, Inc., Contel of the South, Inc., GTE Communications Corporation, and GTE Media Ventures, Inc.

[2] In the Matter of Telecommunications Services Inside Wiring, CS Docket No. 95-184 and MM Docket No. 92-260 (Report and Order and Second Further Notice of Proposed Rulemaking) (rel. Oct. 17, 1997) ("*Order*").

cable operators' requests to: 1) reverse the FCC's decision to apply its wiring disposition rules in mandatory access states; 2) toll the wiring disposition rules upon the filing of legal action by an incumbent operator; 3) limit application of the FCC's rules to the unit-by-unit context; and 4) exclude open video system operators from the Commission's wiring disposition framework. On the other hand, the Commission should: 1) modify the notification and election time frame for the unit-by-unit disposition rules as suggested by the Wireless Cable Association and Ameritech New Media to smooth the transition between competitive video distributors; and 2) adopt DirecTV's suggestion to require an incumbent provider to offer to sell its cable wiring before electing the removal option.

## I. THE COMMISSION SHOULD REJECT THE ATTEMPTS OF INCUMBENT CABLE MONOPOLIES TO CREATE ROADBLOCKS TO COMPETITIVE ENTRY AND UNDERMINE THE FCC'S NEW WIRING RULES

### A. The Commission's *Order* Correctly Facilitates Competition Among MVPDs and Promotes Consumer Choice

The Commission's recently-adopted wiring disposition framework is a significant step toward facilitating competition among multichannel video programming distributors ("MVPDs") and promoting choice for multiple dwelling unit ("MDU") consumers. By creating a reasonable and predictable mechanism for establishing legal rights to cable wiring, this framework will ensure that building owners have the incentive and ability to allow alternative MVPDs to compete fairly with incumbent operators for MDU residents.

In turn, consumers will benefit from increased competition and choice among MVPDs that offer competitive alternatives to incumbent cable operators.

To this end, the Commission's new rules appropriately empower MDU owners to act on behalf of subscribers to implement the disposition of cable wiring in an MDU. Contrary to the renewed objections of Time Warner and other cable operators, there is little reason to conclude that MDU owners will act in a fashion that is inconsistent with residents' interests when using the new rules to make competitive choices. Indeed, the FCC agreed that an MDU owner's incentive to maximize profits does not "always lead[ ] them to be willing and able to ignore their tenants' desires."[3] This is particularly true in the context of resident-controlled buildings, such as condominiums or cooperatives, where the "building owner" for purposes of the Commission's rules is likely to be a resident board or other elected body that serves residents' needs. In its experience, GTE has observed that MDU owners consider service quality and reliability factors when choosing between competing video providers, and MDU owners compete for new residents based upon the types of amenities offered, including video programming services.

This approach also recognizes the consumer benefits that flow from allowing building owners to negotiate directly with incumbent providers and new entrants. For example, such negotiations produce lower transactions costs as compared to requiring the MDU owner or new provider to contact each resident directly. In addition, the MDU owner may obtain volume discounts and economies of scale, which might otherwise be

---

[3] *Order*, ¶ 61.

unavailable to individual residents. While there may be certain isolated instances of problems with owner decisions, the Commission should not modify its general rules based on such infrequent occurrences or deny well-intentioned owners the ability to take advantage of competition to bring new video services to their buildings. Accordingly, the Commission should reject the speculative and anecdotal claims of Time Warner and retain its current rules that permit the MDU owner to facilitate the disposition of cable wiring on behalf of residents.

Further, the Commission should not reconsider its decision to empower MDU owners to introduce competition based upon the Media Access Project's ("MAP's") suggestion that subscribers, rather than MDU owners, must be able to select among MVPDs.[4] Although MAP's motive is not to set up competitive roadblocks, its suggestion will not achieve the intended results of increased competition and consumer choice because of the practical limitations MDU owners face in allowing multiple providers to place additional wiring. In essence, MAP's proposal would amount to a federal mandatory access right for all MVPDs, which the Commission expressly declined to adopt in the *Order*.[5] Further, it is important to note that, in passing the 1984 Cable Act, Congress specifically considered and rejected such a right, explaining that such access should be governed by "negotiated agreement between the cable operator and the

---

[4] *See* Media Access Project and Consumer Federation of America Petition For Reconsideration, CS Docket No. 95-184 and MM Docket No. 92-260, at 13-16 (filed Dec. 15, 1997)("MAP Petition").

[5] *Order*, ¶ 189.

property owner."[6] Accordingly, the Commission should not reconsider its conclusions by making the wiring disposition rules effective only based on individual tenant decisions.

### B. The Commission Should Not Reverse Its Decision to Apply Its Rules in Mandatory Access States

Time Warner and NCTA argue that the Commission's rules should not apply in states that have enacted mandatory access statutes, claiming that such laws give incumbents the right to remain on the premises over the objection of the MDU owner who wants a competitive alternative.[7] In a similar vein, Time Warner and NCTA urge the Commission to reverse its presumption that the cable wiring rules apply in mandatory access states unless the state's highest court has determined that the incumbent always has an enforceable right to maintain its wiring on the property under the applicable mandatory access statute.[8] GTE disagrees and urges the Commission

---

[6] *See* 16 Cong. Rec. H10444 (daily ed. Oct. 1, 1984) (statement of Rep. Fields, noting the deletion of Section 633).

[7] Time Warner Cable Petition For Reconsideration, CS Docket No. 95-184 and MM Docket No. 92-260, at 2 (filed Dec. 15, 1997) ("Time Warner Petition"); The National Cable Television Association Petition for Reconsideration, CS Docket No. 95-184 and MM Docket No. 92-260, at 2-4 (filed Dec. 15, 1997) ("NCTA Petition"). According to the record, mandatory access laws exist in 18 states, including New York and Florida. *Order*, ¶ 182. In New York and Florida alone there are approximately 1.1M and 404,000 units in occupied MDUs with 50 or more units, respectively. *See* United States Department of Commerce, 1990 Census <http://venus.census.gov/cdrom/lookup/884877092>, <http://venus.census.gov/cdrom/lookup/884877219>. Thus, it is clear that any exemption for mandatory access states would deny the benefits of the wiring disposition framework to a substantial number of MDU residents.

[8] Time Warner Petition, at 2-9; NCTA Petition, at 2-4.

to retain its presumption that its rules apply in all states, including those with mandatory access statutes.

Time Warner's and NCTA's suggestions should be rejected because they are flatly inconsistent with the effective operation of the Commission's rules and amount to a misuse of state mandatory access provisions. Their assertion that state mandatory access laws operate to secure a monopolist's right to remain on a premises flies directly in the face of the FCC's wiring disposition mechanism and the pro-competitive requirements of the Communications Act. In order to avoid the absurd result urged by incumbent cable monopolists, the Commission should retain its existing presumption, which places the burden of proving a right to remain on the premises on the incumbent. Where an MDU owner seeks a competitive alternative to an incumbent cable operator, mandatory access laws should not be used to stifle that competition.

Moreover, Time Warner incorrectly asserts that state mandatory access statutes were intended to grant incumbents the right to remain on any MDU premises against the wishes of an MDU owner or tenant.[9] To the contrary, as GTE has stated in its comments, mandatory access laws were enacted as pro-consumer measures designed to ensure only that MDU residents could subscribe to multichannel video services where an MDU owner was unwilling to allow any video provider on its premises. In fact, the incumbent cable monopolists are attempting to turn a consumer access law into insurance that they do not have to face competition from other MVPDs. The incumbent cable operators' proposals not to apply the rules in mandatory access states and to

[9] *See* Time Warner Petition, at 3-5.

reverse the FCC's presumption flatly contradicts the purpose of mandatory access statutes and summarily should be rejected. [10]

GTE also disagrees with Time Warner's assertion that the Commission's presumption destroys an incumbent's state law rights.[11] In its petition, Time Warner argues that "[p]ursuant to such mandatory access laws, an incumbent cable operator *always* has a legal right to maintain cable facilities within an MDU."[12] However, Time Warner's conclusion may not be true in all such states, and this "is an issue for the state courts to decide under their particular statutes."[13] Many of the mandatory access statutes have not yet been interpreted by state courts, and the Commission should give these courts the opportunity to interpret these laws in a pro-competitive manner rather than blindly construing them in an incumbent provider's favor. To this end, the FCC's rules properly allow state courts to "continue to be the ultimate arbiter of whether the

---

[10] However, to the extent that mandatory access statutes are used as an anticompetitive tool to thwart implementation of the FCC's rules, preemption of these laws may be appropriate to ensure that they do not frustrate competition and reasonable rates in video markets. *See* Consumer Electronics Manufacturers Association Comments, CS Docket No. 95-184 and MM Docket No. 92-260, at 2-4 (filed Dec. 15, 1997).

[11] *See* Time Warner Petition, at 6-8.

[12] *Id.* at 2.

[13] *Order*, ¶ 79. For example, an individual determination is appropriate given the varying scope and application of states' mandatory access provisions. *See e.g,* Fla. Stat. § 718.1232 (1996) (applying a mandatory access right to a "resident of any *condominium dwelling unit*, whether tenant or owner") (emphasis added); Fla. Stat. § 718.103 (1996) (defining "condominium" as any property right defined by statute that is comprised of units "that may be owned by one or more persons, and in which there is, appurtenant to each unit, an undivided share in common elements").

incumbent has a legally enforceable right to remain on the premises, and possess the ability to take any necessary and appropriate steps to make the parties whole under state law."[14] Therefore, the Commission's rules do not destroy incumbents' legal rights but instead provide for appropriate legal mechanisms to obtain state law rights, if any.

### C. Time Warner's Proposal To Toll Application of the FCC's Rules Upon the Filing of Judicial Action Should Be Rejected

Time Warner and NCTA suggest that the Commission abandon its rule that tolling of the new wiring rules occur only if an incumbent obtains an injunction within 45 days of receiving a termination notice. In particular, Time Warner instead asks that the rules automatically be tolled if an incumbent *seeks* an injunction, or *any other judicial relief*, within 30 days of receipt of a termination notice from an MDU owner.[15]

The Commission should summarily reject this thinly veiled attempt to create a roadblock to competition. First, any delay in the disposition of wiring delays competitive entry. The Commission's current 45-day rule creates a reasonable period during which an initial determination as to the applicability of the Commission's rules may be obtained. In contrast, Time Warner's proposal enables an incumbent to indefinitely stay the Commission's rules by merely filing a lawsuit, no matter how frivolous. As discussed in GTE's comments, establishing an automatic "stay" of the rules upon the mere assertion of an incumbent's rights is inconsistent with established legal precedent

---

[14] *Order*, ¶ 77.

[15] Time Warner Petition, at 15-18. *See also* NCTA Petition, at 5-6.

for staying rules and will encourage incumbent providers to file lawsuits to maintain their market dominance.

In addition, the Commission has correctly concluded that there is no reason to believe that state courts will not respond expeditiously to requests for injunctions.[16] A 45-day period is a reasonable period during which a state court can make rulings that demand immediate attention, such as injunctions. Moreover, it is reasonable to expect that new entrants and MDU operators will first determine the merit of an incumbent's right to remain on the property, if any, and trigger the Commission's disposition rules only where such a right does not appear to exist. Thus, there is no reason to expect that incumbent operators will need to obtain injunctions as a matter of course. Accordingly, GTE urges the FCC not to establish the competitive roadblock of an "automatic stay" of its rules.

### D. The FCC Should Not Limit Application of the Disposition Rules to the Unit-by-Unit Context

Time Warner also maintains that the new procedures should apply only where the MDU owner agrees to allow unit-by-unit competition and not where the MDU owner seeks to accomplish a whole-building conversion.[17] This proposal should be rejected because it will substantially limit an MDU owner's ability to introduce competition in its building and will obviate the benefits of increased consumer choice realized through inter-MDU competition. The Commission thus should retain the building-by-building

---

[16] *Order*, ¶ 77.

[17] Time Warner Petition, at 12-13.

wiring disposition mechanism in order to guarantee a real opportunity for MVPD competition for MDU subscribers.

First, Time Warner's proposal is an attempt to reverse the pro-competitive benefits of applying the FCC's wiring rules to both the building-by-building and unit-by-unit disposition of cable wiring. As the Commission has recognized throughout this proceeding, limitations in MDUs -- such as space considerations, aesthetic concerns, or safety requirements -- make placement of additional cable wiring in MDUs impractical in many instances. Knowing of the disinclination of many MDU owners to allow additional wiring on their premises, Time Warner must realize that many MDU owners will not opt for unit-by-unit competition. Time Warner's proposal thus will preserve the status quo and continue to allow it to exploit its monopoly position. As GTE and other alternative providers have explained, there would be no need for wiring disposition rules if alternative providers could readily access subscribers by building new facilities.

Second, the Commission's rules should not be limited only to unit-by-unit transfers because inter-MDU competition is important to promoting consumer choice. Inter-MDU competition is the most effective way to develop competition because it encourages new entrants to make the substantial investment required to secure programming and bring services to MDU buildings.[18] Contrary to Time Warner's claim, consumers will benefit from building-by-building competition through lower prices and

---

[18] As a result, unit-by-unit competition will develop where feasible as alternative providers gain the infrastructure and economies of scale necessary to compete with incumbent operators.

increased service options. Indeed, the Commission recognized these consumer benefits in adopting its building-by-building framework.[19]

Accordingly, the building-by-building disposition option should be retained. Nothing in the Commission's rules prevents an MDU owner from facilitating unit-by-unit competition, and this objective should not be mandated by the Commission so as to allow meaningful competition to develop.

## II. THERE IS NO BASIS TO EXCLUDE OVS OPERATORS FROM THE FCC's CABLE WIRING DISPOSITION FRAMEWORK

GTE strongly disagrees with Time Warner's contention that Open Video System ("OVS") operators should not be eligible to use the Commission's wiring distribution framework. Time Warner argues that such a restriction is warranted because OVS operators "are legally required to construct end-to-end facilities all the way to the end-user residence" and to ensure that "unaffiliated OVS...programm[ers]...[are] guaranteed *bona fide* access to and use of the OVS system."[20] Without this restriction, Time Warner claims that unaffiliated programmers will have no opportunity to provide service to MDU residents without installing their own home runs because "use of the home runs will likely be exclusively allocated to the OVS system's affiliated programmer."[21]

---

[19] *Order*, ¶ 42.

[20] Time Warner Petition, at 21-22.

[21] *Id*. at 22.

Time Warner's restriction is neither supported by the plain language of Section 653 nor warranted as a policy matter. In establishing the regulatory requirements for the OVS platform, Section 653 of the Act seeks to ensure that OVS operators make a portion of their system capacity available to unaffiliated programmers in a reasonable and non-discriminatory fashion.[22] Contrary to Time Warner's claim, nothing in Section 653 arguably would prohibit an OVS operator from completing its video delivery platform through the acquisition of "home run wiring" under the Commission's framework, and Time Warner fails to explain how the statute supports its conclusion. Moreover, there is no policy basis for Time Warner's restriction in order to protect unaffiliated programmers because the Commission's rules already impose non-discrimination requirements on OVS operators and establish a process for handling complaints.[23] Furthermore, OVS operators are MVPDs under Section 602(13) of the Act and must be able to use the FCC's wiring disposition rules -- as other MVPDs may -- in order to promote the competitive goals of the Act.[24] Accordingly, the *per se* prohibition proposed by Time Warner should be rejected.

---

[22] *See* 47 U.S.C. § 573.

[23] *See* 47 C.F.R. § 76.1500 et seq.

[24] *See* 47 U.S.C. § 522(13).

## III. GTE SUPPORTS THE SUGGESTION OF AMERITECH AND THE WIRELESS CABLE ASSOCIATION TO SHORTEN SPECIFIC TIMEFRAMES IN THE DISPOSITION RULES

While GTE generally supports the procedures adopted in the wiring disposition rules, it believes that the Commission may decrease the timeframe specified for the disposition of cable home run wiring in the unit-by-unit context in order to ensure a prompt transition of service for subscribers. To that end, GTE supports the Wireless Cable Association's ("WCA") suggestion to shorten to 15 days the time period within which an MDU owner must notify the incumbent provider that it wishes to invoke the Commission's disposition procedures.[25] As WCA points out, the FCC's current 60-day notice period overwhelmingly favors the incumbent provider by giving it time to restructure its service options or "lock individual subscribers into long term service contracts before its competitor even arrives on the property."[26] To avoid this situation and to ensure that consumers are not unnecessarily delayed in receiving service from an alternative provider, GTE agrees that a 15-day period is reasonable and will not unfairly burden incumbent providers, competitive MVPDs, MDU owners, or subscribers.

Along similar lines, GTE urges the Commission to adopt Ameritech New Media's proposal to shorten the time period in which an incumbent operator must elect to sell, abandon, or remove its cable home wiring in the unit-by-unit context. In its petition, Ameritech urges the Commission to shorten this election period to seven days, noting

---

[25] *See* Wireless Cable Association International, Inc. Petition For Reconsideration, CS Docket No. 95-184 and MM Docket No. 92-260, at 16-17 (filed Dec. 15, 1997).

[26] *Id.* at 16.

that a longer time period is not necessary to consider its options under the Commission's rules[27] and will delay the new entrant's provision of service to customers.[28] GTE agrees. The time period proposed by Ameritech will further promote competition by expediting the provision of new services to consumers, while giving the incumbent adequate opportunity to determine how it wishes to proceed under the FCC's rules. Further, this shorter time frame will not limit an operator's ability to enforce its legal rights under contract or state law, including the filing of a state court action.

Therefore, GTE urges the Commission to adopt a 15-day notification period and a seven-day election period in the unit-by-unit context. These proposed changes will ensure the prompt transition of service and remove the opportunity for anticompetitive conduct on the part of the incumbent provider.

## IV. THE COMMISSION SHOULD ADOPT DIRECTV'S SUGGESTION TO REQUIRE AN INCUMBENT PROVIDER TO OFFER TO SELL ITS CABLE WIRING BEFORE ELECTING THE REMOVAL OPTION

GTE also supports DirecTV's suggestion to modify the Commission's procedures regarding an incumbent's election to sell its cable wiring to either the MDU owner or alternative MVPD. In particular, DirecTV urges the Commission to reconsider its decision not to follow the framework used in the disposition of cable home wiring, where the incumbent provider must first offer to sell its wiring to the customer before electing

---

[27] Indeed, an incumbent operator is likely to make its decision as to how it will proceed as a matter of general corporate policy long before it ever has to implement that decision in the individual building context.

[28] Ameritech New Media Petition For Reconsideration, CS Docket No. 95-184 and MM Docket No. 92-260, at 3-6 (filed Dec. 15, 1997).

to remove it.[29] DirecTV maintains that, by declining to follow this approach, the Commission has "provided the incumbent with leverage over the MDU owner's decision to obtain video service from a competitive provider" given the incumbent's ability to threaten removal of its wiring upon termination of service.[30]

GTE also agrees with DirecTV that requiring the incumbent to offer to sell its wiring to the MDU building owner or alternative provider before opting to remove it properly limits the ability of an incumbent to frustrate the benefits of the Commission's rules. As DirecTV notes, the removal of cable wiring throughout an MDU is a substantial undertaking that raises the potential for disruption of residents' service and damage to MDU facilities, and a threat to remove cable wiring may discourage the MDU owner from seeking competitive providers' services at all.[31] Requiring an incumbent to offer to sell its wiring before electing the removal option ensures that the threat of removal will not be used in an anticompetitive fashion. Accordingly, this proposal should be adopted.

## V. CONCLUSION

GTE agrees with the *Order's* conclusion that "establishing rules governing the disposition of the MDU home run wiring will represent a substantial step toward

---

[29] DirecTV Petition For Reconsideration, CS Docket No. 95-184 and MM Docket No. 92-260, at 3 (filed Dec. 15, 1997).

[30] *Id.* at 2-3.

[31] *Id.*

increased competition in the MDU video programming service marketplace."[32] To this end, GTE urges the Commission not to eviscerate the effectiveness of its rules by adopting the anticompetitive suggestions of Time Warner and other incumbent cable operators. These proposals will only serve to substantially limit the effectiveness of the new wiring disposition framework and to further entrench the position of incumbent monopoly providers. GTE, however, supports shortening the notice and election time frames associated with the FCC's rules for unit-by-unit dispositions and DirecTV's proposal regarding election procedures as pro-competitive measures.

Respectfully Submitted,

GTE Service Corporation,
on behalf of its affiliated
domestic telephone and video
service companies

By ______________________

John F. Raposa, HQE03J27
GTE Service Corporation
P.O. Box 152092
Irving, TX 75015-2092
(972) 718-6969

January 15, 1998

Their Attorneys

---

[32] *Order*, ¶ 40.

## Certificate of Service

I, Ann D. Berkowitz, hereby certify that copies of the foregoing "Opposition and Comments of GTE Service Corporation" have been mailed by first class United States mail, postage prepaid, on January 15, 1998 to all parties of record.

Ann D. Berkowitz